BEFORE THE TENNESSEE STATE DEPARTMENT OF EDUCATION

IN THE MATTER OF:	)	
A. G.,	)	
Plaintiff,	)	
vs.	)	**No. 99-38**
	)	**Judge Jay Reynolds**
METROPOLITAN NASHVILLE PUBLIC SCHOOL SYSTEM,	)	
Defendant	)	

FINAL ORDER

Dates of Hearing
November 29, December 16-17, 1999

[redacted] will be referred to as AG or as the student.

REPRESENTING PETITIONER:
Mr. Robert A. Andnerson, Esquire
2021 Richard Jones Road
Suite 350
Nashville, Tennessee 37215

REPRESENTING SCHOOL DISTRICT:
Ms. Mary E. Johnston, Esquire
Metropolitan Government of Nashville and Davidson County
204 Courthouse
Nashville, Tennessee 37201

DUE PROCESS HEARING # 99-38

I. Procedural Background

A due process hearing was requested by counsel through her parents on behalf of their child, AG, in a letter to Metropolitan Nashville Davidson County Schools dated May 28, 1999. The school district notified the State Department of Education in a timely fashion. The State Department of Education on receipt of the request appointed the Administrative Law Judge on June 17, 1999. The 45 day rule was waived for purposes of meeting the time constraints on Plaintiff's counsel's schedule.

II. Findings of Fact

AG is a nine year old child diagnosed with Down's Syndrome. She receives special education and related services due to her disability. Her disabling conditions are mental retardation and language impairment. Her IQ is estimated at 43. AG functions at a pre-Kindergarten age level or younger but has been placed in the first grade during the academic year 1998-1999 even though her functional level was substantially below grade level. The choice of grade level was primarily made because of chronological age considerations. There is no dispute before the Court as to the appropriateness of AG being considered for and/or being provided Extended School Year (ESY) services. (R. pp.60-61, 1102)

AG began in Metro schools during the school year 1996-1997. Prior to this, the family resided in Texas. For the 1996-1997 school year, she was placed in a Kindergarten inclusion program with 30.5 hours per week in a special education classroom and 2.5 hours per week in a regular education Kindergarten with an assistant. She received services of language therapy and occupational therapy consultation.

Over the 1996-1998 school years, the IEP Team met many times. The parent's position has been to request a reduction of the number of hours per week spent in a special education classroom and an increase in the number of hours in the regular education classroom. During the 1997-1998 school year, the number of hours in special education (over the year) was reduced from 17.5 hours per week in August 1997 to 5 hours per week in March, 1998.

AG was hospitalized for surgery early in 1998 and missed approximately two months of school. Homebound services were provided when she returned home. She regained skills, such as walking and talking within a reasonable time. She was very delayed in all her academic areas. She did not master her IEP goals for the 1997-1998 school year. A dispute arose over extended school year services for the summer of 1998. A due process hearing was held on May 7 and 8, 1998. The parent's position was that AG needed 5 days per week at a YMCA Fun Company with an assistant. Metro proposed 2-3 hours per week of special education tutoring at J. E. Moss or in the home. The school system ESY IEP was based on AG's greatest deficits which were academics, not socialization. The Administrative Law Judge ruled that the proposed ESY program "offered by the school system provides a free appropriate public education.

In this case the school system has established that its program is appropriate to prevent significant regression of skill or knowledge retained by the child and therefore complies with the requirements of the IDEA, 20 USCA. 1400 et seq." Order of Judge Stephen King, May 19, 1998.

Various meetings were held to discuss extended school year for Summer, 1999. The major discussion at the May 17,1999 was on ESY. The ESY goals for AG were agreed upon by the IEP team on May 17, 1999. (TR. pp. 755-759). The ESY program consisted of two components, a functional academic component and a community-based component. The main disagreement at the IEP team meeting on May 17, 1999 was placement. (TR. pp. 248, 318-319, 467, 648, 769, 772-73, 782, 783, 828, 913, 91210, 1013, 1129-1130, 1174, 1199).

Charles Hausman, school system expert witness, testified to his knowledge of AG's special education needs, the proposed ESY IEP and generally a Free Appropriate Public Education (FAPE). He concluded that the ESY IEP goals and objectives would have provided AG with a FAPE for the summer, 1999. (TR. 440 to TR 441; TR 442, Exhibit 2). Mr. Hausman supervises the staff which regularly works with AG, attended many of the IEP team meetings of AG, and understands the specific needs of AG. (TR 513-515).

Penny Saed was AG's special education teacher at Eaken Elementary School for the Spring Semester, 1999. Ms. Saed has worked with several Downs Syndrome children and hundreds of children with cognitive delays. She has teaching certifications in Mild/Moderate and Severe/Profound Special Education and an Elementary Education endorsement. She collected a variety of information regarding AG's behavior and educational needs. She testified that the proposed ESY IEP offered educational benefit for AG. (TR 657, 763, 782 and 783).

Mr. Hausman testified that AG needed structure to properly address her goals, to maintain focus on academics, to limit distractions, and to reduce transitions. (TR 530-532). AG needs continuity, or consistency of schedule. (TR. 553). The school district tried to minimize the number of transitions for AG's upcoming summer by hiring her same teacher and having the teacher move much of the material from her old classroom to the room which they expected her to be teaching for the summer. (TR 610).

The only difference between the 4/7/99 IEP goals and the 5/17/99 IEP goals is that the goals written by her speech/language pathologist and the addendum goals written by Ms. Saed (per the parent's request) were added to the 5/17/99 IEP. (TR 692-693) The goal of AG's ESY was maintenance of the skills AG would be most likely to lose over the summer and a continuance of her previous year's goals, in order to carry that progress into her next school year. (TR 723-725, 728-730. Exhibit 7, TR 749-750. 755, 757 and 761). Socialization was not listed as an area where AG was in need of more work. (TR 750-752, Exhibit 2).

The educational goals for AG's ESY 1999 were considered acceptable by the entire team, parents included. (TR 1005, Exhibit 2). Testimony was also given that proficient use of PECS could help AG's actual communication with strangers. (TR 1053). If AG's PECS notebook was not in her visual field and if she was not encouraged to use it, she would not. (TR 1054-1055). In order for AG's communication to progress, the PECS must be used consistently. (TR 1058)

To properly carry out the goals and objectives of the ESY IEP, proper evaluation of a child' performance required the trained judgment of a professional. (TR 1123-1124).

Steve Sparks from the Tennessee Department of Education testified without rebuttal that after the regular 180 day school year, ESY services are provided only for special education students when needed to provide a FAPE. Least Restrictive Environment is not a requirement for ESY. (TR 194-198) Mr. Sparks further testified that he was unaware of any requirements regarding the timing of ESY IEP team meetings. (TR 196).

Linda Owens testified that, the main purpose of the family's ESY program was socialization, encouraging AG to interact with non-disabled peers. (TR 349, Exhibit 8)

Lance Westbrook, Oak Hill Day Camp administrator testified that AG's application to attend his day camp was made somewhere around February-March, 1999. (TR 167, 168).

Mr. Westbrook was never shown AG's IEP prior to or during her time at camp, or any document listing things which she needed to occur at camp. (TR 170-171). To his knowledge, Oak Hill was not provided with a Behavior Plan for AG and he admitted that Oak Hill is not an educational entity trained to provide special education services. (TR. 173, 176-77, and 1157).

A re-evaluation for AG was never refused by the school district. (TR 925). The decision of the IEP considering re-evaluation was that levels of cognitive ability and adaptive behavior were needed to determine AG's eligibility. (TR 934-936, Exhibit 47). AG's mother signed the release giving permission for the school district to do its re-evaluation on 11/5/98. (TR 939, Exhibit 48). The school system's psychologist listed many attempts to reach AG's mother by various means and without success between 10/27/98 and 12/10/98 to complete various parts of the evaluation process. (TR. 940-951). The parent admitted that she missed the 12/4/8 meeting with the school psychologist to complete the Vineland Adaptive Behavior test. (TR. 488).

Parents employed Dr. Kaas-Weiss to complete an Independent Educational Evaluation unbeknownst to Metro Schools. (TR 1064, 1069).

State guidelines require classroom observations to be included in evaluations for special education for mental retardation. (TR 1065). Dr. Kaas-Weiss' report was insufficient to re-certify AG for special education purposes because state guidelines require classroom observations to be included in evaluating for special education, and she had none in her report. (TR 1064-1066, Exhibit 18).

III. Issues

1. Whether or not the goals and objectives for ESY proposed by the school district were appropriate for AG?

2. Whether or not the placement for ESY services recommended by the school district was appropriate for AG?

3. If, the goals and objectives or placement for ESY were not appropriate as proposed by the school district, did the parent's alternative choice of extended school year meet the needs of AG?

4. If the parents alternative choice was appropriate, what re-imbursement are the parents entitled to?

5. Are the parents entitled to have their Independent Educational Evaluation (IEE) paid for my Metro Public Schools?

IV. Discussion of Law

Special education and related services must be provided to a child with a disability pursuant to an Individualized Education Program (IEP). Extended school year (ESY) services are not a specific component of the IDEA, but are considered a component of the provision of a free appropriate public education (FAPE) for some students. FAPE is defined in the Individuals with Disabilities Education Act as:

> (8) Free appropriate public education
>
> The term 'free appropriate public education' means special education and related services that-
> (A) have been provided at public expense, under public supervision and direction, and without charge;
> (B) meet the standards of the State educational agency;
> (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
> (D) are provided in conformity with the individualized education program required under Sec. 614(d).

Section 1401(8)

Special education is defined as:

(25) Special education

The term 'special education' means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including -
(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and
(B) instruction in physical education.

Section 1401 (25)

Extended School Year is defined in the regulations promulgated pursuant to IDEA-97, as follows:

34 CFR 300.309 Extended school year services

(a) General. (1) Each public agency shall ensure that extended school year services are available as necessary to provide FAPE, consistent with paragraph (a)(2) of this section.

(2) Extended school services must be provided only if a child's IEP team determines, on an individual basis, in accordance with Sections 300.340-300.350, that the services are necessary for the provision of FAPE to the child.

(3) In implementing the requirements of this section, a public agency may not --

(i) Limit extended school year services to particular categories or disability; or

(ii) unilaterally limit the type, amount, or duration of those services.

(b) Definition. As used in this section, the term extended school year services means special education and related services that --

(1) Are provided to a child with a disability --

(i) Beyond the normal school year of the public agency;

(ii) In accordance with the child's IEP; and

(iii) At no cost to the parents of the child; and

(2) Meet the standards of the SEA.

Any ESY service must be an appropriate educational experience for the disabled child's situation. Johnson v. Independent School District No. 4 of Bixby, Tulsa County, OK, 17 EHLR 170, (10th Cir, OK 1990) This complies with the second prong of the substantive component of the IDEA as determined by Rowley. Specifically, the question is whether the individualized education program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefit? Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S.

176, 206-207, 102 S.Ct. 3034, 73 L.Ed.2d 690, 5 Ed. Law rep. 34 (1982). This question must be answered in determining the appropriateness of the ESY services.

The Sixth Circuit in 1990 spoke very clearly on the subject of Extended School Year services. The Court determined that several factors may be used in determining the need for ESY other than "regression-recoupment" standard. The Court did not downplay regression-recoupment but said the standard for ESY should be flexible enough to accommodate such refinements in professional understanding of when a child needs an ESY. Cordrey v. Euckert, 17 EHLR 104 (6th Cir. 1990). Furthermore, the school district is only required to provide an appropriate education which is not synonymous with the best possible education. "It is not an education which enables a child to achieve his full potential: even the best public schools lack the resources to enable every child to achieve his full potential." Daugherty v. Hamilton County Schools, 29 IDELR 699 (1998) judgment affirmed July 30, 1998 citing Cordrey at 1473. The Sixth Circuit in Daughtery defines ESY as "an organized school program that extends beyond the typical 180 days school year." Daugherty at 774.

The IDEA does not mandate indifference to legitimate practical consideration or interference with other school programming to create artificial LRE settings during summer months. Reush v. Fountain, 872 F. Supp. 1421, 1438, 21 IDELR 1107, 1122 (D. Md. 1994). "There is no requirement in the federal or state special education law that the summer component of the extended school year program must be in the least restrictive program for that child." Canton Pub. Sch., 24 IDELR 1131 (MA. 1996). LRE doe not necessarily mean regular education (or nondisabled) settings for every special education student in every circumstance. LRE is dependent on the child and the child's needs. In Hudson v. Bloomfield Hills Pub. Sch, 910 F.

Supp. 1291, 1303 (E.D. MI 1995), affirmed at 108 F.3d 112 (6th Cir. 19997), the proposed placement in a segregated classroom for academic need and mainstreaming for non-academic programs was appropriate for a mentally retarded student. Her educational, instructional program was appropriately set in the segregated classroom. The court relied on its earlier ruling in Roncker v. Walter, 700 F.2d 1058, 1065 (6th Cir. 1982), which held that if services necessary for the child could not be reasonably provided in a non-segregated setting, the LRE test was met. If the proposed ESY IEP is appropriate as it prevents substantial regression, the question of LRE is not reached. The United States Department of Education does not interpret the LRE provision to mean that school districts must establish public programs for non-handicapped children for the sole purpose of being able to implement the LRE provision for children with handicaps who require ESY. Letter to Myers, 213 IDELR 255 (OSEP 1989).

Parent's desires are not dispositive. " . . . educators have the power to provide handicapped children with an education they consider more appropriate than that proposed by the parents." Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 (7th Cir. 1988). In any event, the ESY IEP would have been implemented in a setting with many opportunities to interact with non-disabled peers according to the classroom teacher, Ms. Saed. This satisfied the LRE requirement. LaMesa Spring Valley Sch. Dist., 30 IDELR 191, 207 (SEA Ca. 1999).

Courts have noted the usefulness of testimony of teachers and support staff who have actual experience with the child, going so far as to credit their testimony over "experts" retained for the purpose of testifying at a hearing. Schreiber v. Ridgewood Bd. of Educ, 952 F. Supp. 205, 211-212 (D.N.J. 1997). This Court recognizes in the instant case, the very valid reasoning and testimony of the various teachers, and other professionals who know AG on a personal basis and

who have worked directly with her in the classroom and school for many hours. In determining whether FAPE was provided, "deference was given to trained educators over others. Heather S. v. State of Wisconsin, 125 F.3d 1045, 1057 (7th Cir. 1997).

Parents have "the burden of proving by a preponderance of the evidence that the IEP was inadequate." Renner v. Board of Education of the Public Schools of the City of Ann Arbor, 185 F.3d 635, 642 (6th Cir. 1999), citing Doe v. Defendant I, 898 F.2d 1186, 1191 (6th Cir. 1990). The party challenging the terms of an IEP bears the burden of providing by a preponderance of the evidence that the IEP is the product of defective procedures or is substantively inappropriate. Brimmer v. Traverse City Area Public Schools, 872 F. Supp. 447, 49 (W. D. MI 1994).

If the placement results from a "unilateral" decision by the student's parents, the parents are entitled to reimbursement only if the court finds both that (1) the public placement violated IDEA and (2) the private placement was proper under the Act. Wise v. Ohio Dept. of Educ., 80 F.3d 177, 182 (6th Cir. 1996); Doe v. Metropolitan Nashville Public Schools,. 133 F.3d 384, 387 (6th Cir. 1998), rehearing and suggestion for rehearing en banc denied, cert. denied October 5, 1998. For the parents to prevail in re-imbursement, the school district's IEP must be found to be inappropriate, and then the parents may be entitled to re-imbursement for a private placement. See Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15 (1993), 20 IDELR 532.

The determination of assessing the adequacy of an IEP (and its provision of FAPE) is a difficult one. The U. S. Supreme court suggested that the inquiry is a fairly intensive one, but if the IEP is "reasonably calculated to enable a child to achieve passing marks and advance from grade to grade", it is sufficient. Board of Education of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 US 176, 20-4 (1982). Implicit in the term "appropriate education" is the

"requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." (Rowley at 3048). The burden is on the party contesting the adequacy of the IEP to demonstrate that the IEP is inappropriate. Doe v Board of Education of Tullahoma City Schools, 9 F3d 455, 458 (6th Cir. 1993).

The Tennessee Department of Education, Division of Special Education, Special Education Polices and Procedures Manual, January 1994, page 38-39, outlines what must be included in an evaluation of a mentally retarded child. Among other extensive regulations, the regulations provide for an adaptive behavior evaluation to be done in the school. The evaluation must include "systematic documented observations by an appropriate specialist which compare the child with other children of his/her group . . ."

V. Legal Analysis

AG's classroom teacher and staff participated in the development of an IEP for ESY services for the summer of 1999 over a series of IEP team meetings. The school system initially proposed 3 hours per day of Special Education and 3 hours per day in a community education recreation program. This was not satisfactory to the parents. Metro finally proposed three hours per day of special education at the Harris Hillman school for seven weeks. During the summer, Harris-Hillman facility also houses a summer care program. Metro consistently maintained that an academic program, to continue her IEP goals, was necessary for AG to succeed.

The school system took into consideration when determining ESY for AG such things as AG's tendency to regress during the summer, any prior regression, ability to recoup skills,

necessary services during the summer to permit her to benefit from school instruction, and general progress toward her education goals in determining what is a FAPE for her. The parents agreed to the goals and objectives of the ESY IEP proposed by Metro. The ESY IEP was designed to prevent substantial regression in her skills. The goals continued her use of the Picture Exchange System (PECs), continued her fine motor skills, continued her speech and occupational therapy sessions, continued her work on appropriate behavior for school and continued her letter and color recognition skills. The ESY IEP of the school district was appropriate for AG.

The parent has alleged that ESY placements must comply with the IDEA provision of least restrictive environment. However, the Court finds that LRE does not apply for ESY services.

The parents basically rejected the placement of the school district for their own placement. The parents never cited sufficient evidence why Metro's placement would not have delivered the appropriate services for AG. It is abundantly clear that the parents wanted their placement regardless of what Metro offered. Now the parents would like Metro to re-imbursement them for services the parents sought on their on. This Court cannot and will not force a school district to expend taxpayers money on activities that parents say are better when the school district had a perfectly acceptable and appropriate program and placement which the parents simply refused to avail themselves of.

If Metro had not provided an appropriate Extended School Year services, the placement of the parents, Oakhill Day Camp, Camp Biolta, and other activities that the parents involved AG, were equally not appropriate to meet the ESY IEP. While activities such as swimming, horseback riding, creek walks, arts and crafts, and archery are nice activities. this Court cannot conclude that

they appropriately met the needs of AG and her ESY IEP. The recreational program as described by testimony of Plaintiff's witnesses cannot be considered to be special education for AG. When viewed as a whole, Extended School Year must involve specialized instruction as defined in the IDEA implementing regulations and must be carried out by trained staff.

The parent did not comply with the statutory, regulatory, and state procedure mandates regarding an Independent Educational Evaluation (IEE). The IEE completed does not contain components plainly listed in the State's Policy and Procedure Manual. The IDEA with its changes spell out with specificity what must occur before parents are entitled to be reimbursed for an IEE. A parent is always entitled to obtain an IEE, but not to reimbursement for the school system. The facts of this case do not meet the statutory requirements for reimbursement.

VI. Conclusion

While the school district did wait till the last minute to finish the ESY program for AG, she was not denied services due to the time constraints. AG would have benefited from the program proposed by the school district. Some criticism should be given to the District for waiting for the last minute to determine ESY. However the record also reflects that the parents did not assist Metro in meeting in a timely fashion. Current federal regulations implementing IDEA do not require a specific amount of time before the end of the school year for an ESY IEP meeting to be held. In fact the drafters of the regulations specifically rejected a time frame. (See Federal Register, Vol. 64, No. 48. 3-12-99, p. 12576) However, this Court does admonish both parties to begin earlier and to work cooperatively to assist the student in the future.

The school system provided an appropriate ESY IEP which could have provided AG with maintaining skills which might otherwise have been lost during the summer recess. The school system is not obligated to prove unlimited services to a disabled student. The recreational programs which the parents availed themselves of can not be consider special education under the federal definition. Further, no specialized instruction was involved nor was there testimony that the ESY IEP ever was utilized.

The summer services provided to AG were not special education by any stretch of the imagination. No IEP was utilized, no trained staff implemented the services, no data was maintained, and no specialized or individualized program was developed or implemented. The student participated without individualization in the camp activities. If any, the emphasis was on socialization, not educational goals and objectives. These activities do not meet the statutory or regulatory requirements of IDEA for Extended School Year services as part of FAPE. The student is not entitled to reimbursement for the cost of providing substitute activities and services. Metro has demonstrated that the services proposed in the ESY IEP were appropriate to give benefit to AG.

The record is replete with many instances where the parents were determined to refuse whatever program Metro would have proposed. The parents decided their own program--- consisting of Camp Biota, Oak Hill School Camp, therapy at Bill Wilkerson's Center, one on one instruction by AG Great-grandmother; hundred hours of coordination time expended by the family, capital investments necessary to compensate for the lost of Metro facilities as well as "soft costs"--- were best for their daughter. This is the right of every parent, but Metro is not expected

to re-imburse for the "best" program when Metro's ESY IEP would have provided AG with what the law required---FAPE.

With regards to re-evaluation by Metro to certify AG was not completed timely, the delay was due, at least in part, to the parent's conduct. Parents are obligated to operate within the IDEA's framework. The evidence shows little cooperation by the parent to complete the re-evaluation in a timely manner.

The Court does not have to address the issue of monetary damages as it has found that Metro Schools IEP for extended school year services provided a FAPE for AG.

VII. Decision

IT IS HEREBY ORDERED THAT the proposed Extended School Year, Individualized Education Program offered by Metro Public Schools provided a Free Appropriate Public Education (FAPE) in the Least Restrictive Environment LRE) for AG.

IT IS FURTHER ORDERED THAT the private arrangements for AG by her family were not special education in nature and were not appropriate to provide a FAPE for AG.

IT IS FURTHER ORDERED THAT the parent is not entitled to reimbursement for the cost of these private arrangements.

IT IS FURTHER ORDERED THAT the re-imbursement for the Independent Educational Evaluation is denied for failing to meet State standards.

IT IS FURTHER ORDERED THAT Metro Nashville Davidson County Public Schools is the prevailing party on all issues in dispute.

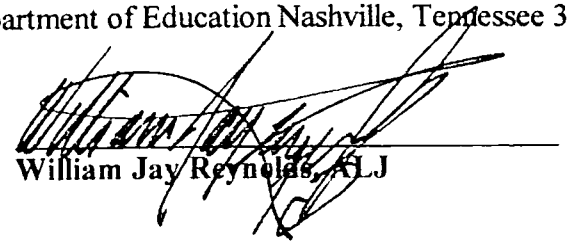
THIS DECISION IS BINDING UPON ALL PARTIES UNLESS APPEALED. Any party aggrieved by the findings and decision may appeal to the Davidson County Chancery Court of the State of Tennessee, or may seek review in the United States District Court for Tennessee. Such an appeal must be taken within sixty (60) days of the entry of final order in non-reimbursement cases and within three (3) years in cases involving reimbursement of educational costs and expenses. In appropriate cases, the reviewing Court may direct that this Final Order by stayed.

ENTERED this the 9th day of October 2000.

William Jay Reynolds (013932)
Administrative Law Judge
611 Court Street
Savannah, TN 38372
(901) 925-7000

Certificate of Service

I hereby certify that a true and exact copy of this Final Order was mailed on the 9th day of October 2000, to counsel or the school system, counsel for the parents, and Mr. Bill Ward, Division of Special Education, State Department of Education Nashville, Tennessee 37243-0375.



William Jay Reynolds, ALJ